

Interrogational Torture in Criminal Proceedings - Reflections on Legal History -, Vol. 2

Krey, Volker; Klein, Jan Niklas; Staudacher, Peter; Roggenfelder, Thomas

Veröffentlichungsversion / Published Version
Arbeitspapier / working paper

Empfohlene Zitierung / Suggested Citation:

Krey, V., Klein, J. N., Staudacher, P., & Roggenfelder, T. (2015). *Interrogational Torture in Criminal Proceedings - Reflections on Legal History -, Vol. 2.* (Rechtspolitisches Forum, 73). Trier: Institut für Rechtspolitik an der Universität Trier. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-56694-9>

Nutzungsbedingungen:

Dieser Text wird unter einer Deposit-Lizenz (Keine Weiterverbreitung - keine Bearbeitung) zur Verfügung gestellt. Gewährt wird ein nicht exklusives, nicht übertragbares, persönliches und beschränktes Recht auf Nutzung dieses Dokuments. Dieses Dokument ist ausschließlich für den persönlichen, nicht-kommerziellen Gebrauch bestimmt. Auf sämtlichen Kopien dieses Dokuments müssen alle Urheberrechtshinweise und sonstigen Hinweise auf gesetzlichen Schutz beibehalten werden. Sie dürfen dieses Dokument nicht in irgendeiner Weise abändern, noch dürfen Sie dieses Dokument für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, aufführen, vertreiben oder anderweitig nutzen.

Mit der Verwendung dieses Dokuments erkennen Sie die Nutzungsbedingungen an.

Terms of use:

This document is made available under Deposit Licence (No Redistribution - no modifications). We grant a non-exclusive, non-transferable, individual and limited right to using this document. This document is solely intended for your personal, non-commercial use. All of the copies of this documents must retain all copyright information and other information regarding legal protection. You are not allowed to alter this document in any way, to copy it for public or commercial purposes, to exhibit the document in public, to perform, distribute or otherwise use the document in public.

By using this particular document, you accept the above-stated conditions of use.

Rechtspolitisches Forum

Legal Policy Forum

73

Volker Krey

With Assistance by

Jan Niklas Klein and Peter Staudacher,

in Addition Thomas Roggenfelder

Interrogational Torture in Criminal Proceedings
– Reflections on Legal History –

Volume II

Institut für Rechtspolitik
an der Universität Trier



Rechtspolitisches Forum
73

IN MEMORY OF MY DEAR COLLEAGUE

BERND VON HOFFMANN

INTERROGATIONAL TORTURE IN CRIMINAL PROCEEDINGS

– REFLECTIONS ON LEGAL HISTORY –

Volume II

by

Prof. Dr. Volker Krey

With Assistance By

*Jan Niklas Klein and Peter Staudacher,
in Addition Thomas Roggenfelder*

University of Trier, Germany

Institut für Rechtspolitik
an der Universität Trier



Impressum

Herausgegeben Prof. Dr. Thomas Raab
unter Mitarbeit von Johannes Natus und Claudia Lehen.

Institut für Rechtspolitik an der Universität Trier · D-54286 Trier
Telefon: +49 (0)651 201-3443 · Telefax: +49 (0)651 201-3448
E-Mail: irpsek@uni-trier.de · Internet: www.irp.uni-trier.de

Die Redaktion übernimmt für unverlangt eingesandte Manuskripte keine Haftung und schickt diese nicht zurück.

Namentlich gekennzeichnete Beiträge geben nicht in jedem Fall die Meinung des Herausgebers oder der Mitarbeiter des Instituts wieder.

© Institut für Rechtspolitik an der Universität Trier, 2015
ISSN 1616-8828

VOLUME II

TABLE OF CONTENTS

Preface:

Continuation of Part One:

Historical Development of Interrogational Torture in
Criminal Proceedings

Second Chapter:

Late Middle Ages; Early Modern Age (circa 1500-1800)

VI. Late Middle Ages

1. Development of Public Criminal Law, Characterized
by Cruel Penalties and Interrogational Torture,
in the Northern Italian Cities

2. Opening the Floodgates to such Awful Aberration
of Criminal Law and Criminal Proceedings by
Ecclesial Heresy Trials

3. Using Interrogational Torture since End of the
13th Century in German Cities

4. Acceptance of this Instrument by the
German Territorial Laws

5. Private Criminal Law still Relevant/Class Justice
as a Characteristic Element of Criminal Justice

6. Causes for the Rise of the *Inquisitionsprozess*
(i.e. Inquisitorial Trial/Inquisitory Proceedings)
Going Hand in Hand with Cruel Penalties and Torture

7. Conclusion

VII. Early Modern Age (circa 1500-1800)

1. Continuation of the Late Middle Ages in the 16th and 17th Century

a) German Criminal Law: Completion of the Reception of Canon Law and Roman Law by the *Constitutio Criminalis Carolina* (CCC, dated 1532)

b) The Witch Trials during the 16th and 17th Century:
Decline of Criminal Law and Criminal Proceedings

2. The 18th Century as the Actual Beginning of the Modern Age in Criminal Law and Criminal Procedure Law

– Abolition of Witch Trials and Torture Caused by the Enlightenment –

Part Two:

Refusal of the Predominant View that the Torture's Reign of Terror in the Former *Inquisitionsprozess* merely was the Inevitable Consequence of the Unreasonable Law on Evidence Applicable at that Time

I. The Victims of Interrogational Torture:
Victims of Class Justice?

II. Parallelism between the Development of Torture and the Evolution of Punishment Striking Life and Limb

III. Torturing the Accused despite the Testimony of two Witnesses with Good Repute; Interrogational Torture of Witnesses (*Zeugenfolter*); Torture as an Additional Cruelty to the Accused's Punishment (*Straffolter*); Torturing for Contempt of Court

IV. Regardless of the Abolition of Torture since the Middle of the 18th Century: Continuance of Criminal Justice in its Manifestation as *Inquisitionsprozess* (Inquisitorial Trial) until its Replacement by the Modern Criminal Proceedings in the 19th Century

– No Collapse of Criminal Proceedings despite of the Torture's Abolition –

Closing Words

ANNEX

VOLUME I

TABLE OF CONTENTS

Introduction

– Torture: Still Being a Current Problem

Part One:

Historical Development of Interrogational Torture
in Criminal Proceedings

First Chapter:

Code of Hammurabi; Germanic Law; Roman Law;
Age of the Kingdom of the Franks;
High Middle Ages

I. Code of Hammurabi (circa 1750 B.C.)

II. Germanic Law

1. Predominance of Private Criminal Law:
Criminal Law as a Private Matter

2. Beginning of Governmental Criminal Law/
Public Criminal Law

3. Interrogational Torture During
the Germanic Age

III. Roman Law

1. Roman Republic

2. Roman Imperial Era (Principate of Augustus up to the End of the Western Roman Empire)

3. Conclusion

IV. Age of the Kingdom of the Franks (Early Middle Ages)

1. Private Criminal Law still Being Predominant

2. Public Criminal Law

3. Interrogational Torture in Public Criminal Proceedings

4. Conclusion

V. High Middle Ages

INTERROGATIONAL TORTURE IN CRIMINAL PROCEEDINGS

– REFLECTIONS ON LEGAL HISTORY – *

Volume II

VOLKER KREY

WITH ASSISTANCE BY

*JAN NIKLAS KLEIN AND PETER STAUDACHER,
IN ADDITION THOMAS ROGGENFELDER***

Preface

This paper is the continuation of Volume I (published in 2014), and at the same time the conclusion of the present publication on the history of interrogational torture in criminal proceed-

* This article is in its core the translation of the author's manuscript titled "*Zur strafprozessualen Folter – Rechtshistorische Betrachtungen –*", published in Festschrift for *Hans-Heiner Kühne*, University of Trier (2013, p. 769 to 792). In doing so, the manuscript has been amended to a certain extent.

** *Dr. Volker Krey*, Full Professor of Law, Faculty of Law, University of Trier, also judge at the Court of Appeals (*Oberlandesgericht*) Koblenz (1978-1998). Email: kreyv@uni-trier.de; *Jan Niklas Klein*, senior researcher and assistant lecturer, is member of the staff of *Prof. Dr. Robbers'* chair, University of Trier; *Peter Staudacher* is law student at Trier University; *Dr. Thomas Roggenfelder*, Attorney at Law, is a former member of the staff of *Prof. Dr. Krey's* chair.

ings. As to Volume I's subject and contents see its *Introduction* and its *Table of Contents*, the latter additionally annexed to Volume II's Table of Contents.

PART ONE: Historical Development of Interrogational Torture in Criminal Proceedings

– Continuation of Volume I –

Second Chapter: Late Middle Ages; Early Modern Age

As already mentioned¹, the era of the High Middle Ages, ending at the beginning of the 13th century A.D., still was **neither** characterized by cruel penalties striking life and limb (*peinliches Strafrecht*) **nor** by the *Inquisitionsprozess*,² carried out by the authority and dominated by the horror of **torturing**. Rather, not until the Late Middle Ages (1200-1500), the flood-gates to such awful aberration of criminal law and criminal proceedings were opened. In addition to that, the final bursting of the dam even later took place, namely in the Early Modern Age during the flood tide of witch trials (16th and 17th century):

¹ See this paper's Volume I, Part One, First Chapter, V.

² Thereto *infra*, VI, 2.

VI. Late Middle Ages

1. Development of Public Criminal Law, Characterized by Cruel Penalties and Interrogational Torture, in the Northern Italian Cities

Since the 13th century, in the northern Italian cities the development of public criminal law and criminal proceedings, using cruel punishment and interrogational **torture**, took place, namely as an instrument to fight urban mass crime, primarily committed by members of the lower social classes and foreigners.³ This development led to a shameful class justice:

Criminal offenders, not belonging to the impecunious lower classes, still could enter into *Sühneverträge* (i.e. “expiation contracts”/“atonement contracts”) with the victim concerned respectively his clan,⁴ or at least could replace imposed punishment respectively its execution by payment to the city treasury – a very welcome source of revenue. Those offenders generally not even were subjected to torture.

Here, the relevant city laws reflected to some extent the legal situation of the Roman Empire⁵ being known at that time since the so-called reception of Roman law, which in its core has started in the 12th century. This statement (comparability with the criminal law of the Roman Empire) is based on the following insight: already the Roman Empire’s criminal law was

³ See: v. *Hippel*, *Deutsches Strafrecht*, Vol. I, 1925 (reprint 1971), p. 89, 94; *Rüping/Jerouschek*, *Grundriss der Strafrechtsgeschichte*, 6th edition, 2011, side note, 40 et seq., 43, 81, 82; *Wesel*, *Geschichte des Rechts*, 4th edition, 2014, side note 237.

⁴ Thereto Volume I of this paper, Part One, II, 1, IV, 1 a, V, 1.
– As to the *fredus* (peace money), in addition to be paid to the public authority, here: the city treasury, see Volume I, Part One, IV, 1 a. –

⁵ See Volume I of this paper, Part One, III, 2, 3.

characterized by rising cruelty and increasing use of torture, as far as offenders being members of the lower classes were concerned.

2. Opening the Floodgates to such Awful Aberration of Criminal Law and Criminal Proceedings by Ecclesial Heresy Trials

Even before the Late Middle Ages, there were heresy trials. However, also here capital punishment and in particular **torture** generally were taboo until the end of the High Middle Ages,⁶ although occasionally excesses happened.

Still in the famous *Decretum Gratiani*, dated from middle of the 12th century and being the decisive collection and systematization of Canon Law by the monk and canon lawyer *Gratian*, there is a clear disapproval, if not even prohibition, of interrogational torture⁷. Moreover, even the Council of 1215 under Pope *Innocent III* still waived the use of torture in case of persecuting heretics⁸.

However, opening the floodgates to capital punishment and interrogational torture soon occurred, namely in the middle of the 13th century: the rising “Heretical Movements” (*Waldensians/Waldenses, Cathar/Catharism etc.*) led, from the Roman Church’s point of view, to a serious threat to its rule: thus,

⁶ As to capital punishment see Volume I, Part One, V, 1 at the end with footnote 96. As to torturing see the following text with footnote 7, 8.

⁷ Thereto: v. *Hippel*, p. 87 at the end, 88; *Rüping/Jerouschek*, side note 30, 31, 81.

⁸ *Eb. Schmidt*, Einführung in die Geschichte der deutschen Strafrechtspflege, 3rd edition 1965, p. 93.

fighting such heretical movements became a question of power.⁹

As a consequence of this threat, the Church increasingly used criminal law as a sharp weapon to protect its power. More precisely, the Church developed the so-called *Kanonischer Inquisitionsprozess* (i.e. canonical inquisitory process) against heresy, being characterized by the following elements:¹⁰

- Criminal prosecution *ex officio*.
- Rejection of ordeals (judgment of God), 1215 by Pope *Innocent III*.
- Interrogational **torture** as a means to extort the accused's confession and/or a witness' incriminating testimony (Pope *Innocent IV*, 1252).
- Use of cruel capital punishment by burning to death the sentenced persons.

Torture and capital punishment allow, following a statement of *v. Hippel*, to describe such persecution of heretics as a blemish.¹¹ Here, the Church has abandoned its until then expressed standpoint "*ecclesia non sitit sanguinem*"¹² (the Church has no thirst for blood). In the course of the further persecution of heretics, and later on of witches, Church and Canon Law became more and more "bloodthirsty".

However, Pope *Innocent IV* has not introduced the interrogational torture into the Late Middle Ages' law for the first time.

⁹ Thereto: *Fried*, *Das Mittelalter* (i.e. the Middle Ages), 2nd edition 2009, p. 273 et seq., 276-278.

¹⁰ As to the following: *Fried*, p. 278; *v. Hippel* (supra note 3), p. 83 with footnote 4, 7, p. 86-90; *Rüping/Jerouschek* (supra note 3), side note 29-35, 79, 82.

¹¹ *v. Hippel*, p. 89.

¹² See *v. Hippel*, p. 90.

Rather, as mentioned above, northern Italian cities have used that interrogational instrument already before 1252. Yet, this fact has been expressively emphasized by the Pope himself.¹³ Nevertheless, his **legalization** of torture in Canon Law and at the same time its **moral legitimization** were absolutely fatal.

3. Using Interrogational Torture since End of the 13th Century in German Cities

Subsequently, German towns have adopted the use of torture in criminal proceedings since end of the 13th century, significantly starting with the Bishop Cities. From their point of view, interrogational torture was a useful means for fighting crime committed by the so-called “*randständige schädliche Leute und fahrendes Volk*” (near translation: marginal and unsocial/harmful people of the lower classes, or travelling folk). Anyhow, the torture’s legalization was so serious that the cities strived towards royal privileges of using torture.¹⁴

4. Acceptance of this Instrument by the German Territorial Laws

The German territorial rulers/German princes (e.g. Dukes, Counts Palatine, Landgraves, Archbishops as Electors) had wrested nearly the complete penal power from the German Kings/Emperors since the 13th century: by the *Statutum in favorem principum* of the famous Emperor *Friedrich II of Hohenstaufen*, dated 1231/32, the power of criminal justice was delegated to the territorial rulers, shortly later also the power of

¹³ Rüping/Jerouschek, side note 82.

¹⁴ Rüping/Jerouschek, side note 53, 69, 78, 79, 81; *Eb. Schmidt*, p. 91, 92; *Wesel* (supra note 3), side note 236, 237.

criminal legislation.¹⁵ Particularly in connection with fighting feuds by the German princes, there was a step by step development of a sharp criminal law striking life and limb (in German: *peinliches Strafrecht*) in their territories; and as a result of the torture's legitimation by the Church (supra, 2.), also this awful instrument has been introduced into territorial laws during the Late Middle Ages.¹⁶

5. Private Criminal Law still being relevant/Class Justice as a Characteristic Element of Criminal Justice

Irrespective of the inquisitory process (see supra, 2.), being on the rise in the Late Middle Ages, there still were important remains of the old criminal justice system at that time, characterized by feud, *Sühneverträge* (expiation contracts),¹⁷ and the replacement of the so-called *peinliche Strafen* striking life and limb by payments to the treasury. Moreover, the traditional **private prosecution** still played a major role, if not even a dominant one, until the end of the Middle Ages.¹⁸ However, in this context a shameful class justice was to be ascertained, as already mentioned: *Sühneverträge* and the aforesaid replacement of imposed punishment respectively its execution by payments to the authority did not take place, as far as impecunious members of the lower classes were concerned. Primarily, members of such lower classes and of the travelling folk were subjected to the *Inquisitionsprozess* and **torture**.

¹⁵ Wesel, side note 206, 240.

¹⁶ Rüping/Jerouschek, side note 82 at the end; Wesel, side note 237, 240.

¹⁷ See supra, VI, 1 with footnote 4.

¹⁸ Thereto: v. Hippel (supra note 3), p. 128, 129, 133, 135, 136, 154, 157; Rüping/Jerouschek, side note 53, 63, 64, 69, 77; Wesel, side note 236.

Here, the well-known phrase “*armer Sünder, der zum Richtplatz geführt wird*” (poor sinner being transported to the place of execution) got a double meaning.

This class justice found a particularly clear expression in privileges for the nobility, clergy, and doctores of law, not to be subjected to torture¹⁹

– even though in witch trials these privileges did not always provide reliable protection²⁰ –.

6. Causes for the Rise of the Inquisitionsprozess (i.e. Inquisitorial Trial/Inquisitory Proceedings) Going Hand in Hand with Cruel Penalties and Torture

The advance of the *Inquisitionsprozess* characterized by penalties striking life and limb as well as by torture in the Late Middle Ages primarily was based on the following reasons:

Feuds were unwanted; *Sühneverträge* were useless as far as the offender was impecunious. The traditional private prosecution was inopportune for the victim of the respective criminal offense, if the offender was a member of the nobility or another socially powerful person; in addition, such private prosecution more generally was dangerous due to the threat of sanctions in case of acquittal.²¹

The until then dominant law of evidence (oath; oath of purgation with aid of compurgators; ordeal by battle and other or-

¹⁹ Rüping/Jerouschek, side note 129, 135.

²⁰ In addition see: infra, VII, 1 b (4); Krey, Von Zauberern und Hexen (i.e. About Magicians and Witches) – Rechtshistorische Betrachtungen –, published in Festschrift for Kristian Kühl, München 2014, p. 19, 41, 42 with further references.

²¹ Thereto: v. Hippel, p. 153 at the end, 154; Rüping/Jerouschek, side note 53, 69, 77, 104.

deal methods) was disapproved by the church and/or increasingly considered as irrational. In contrast, convicting the accused by **two witnesses** with good repute or based on his **confession**, the latter characterized as royal proof, was seen as the most appropriate way of ascertaining the truth. Therefore both, two witnesses and confession, were the only evidence admissible in the *Inquisitionsprozess*.²²

Such requirement of **two** witnesses in the final analysis was based on Old Testamentary archetypes,²³ furthermore it was an expression of a deep mistrust against evidence by testimony.²⁴

The legal meaning of the **confession** as the main evidence essentially resulted from the following reasons:

a) Beside proof by testimony of two witnesses, there only existed one other evidence, namely the accused's confession; thus, the new law of evidence being decisive for the *Inquisitionsprozess* was absolutely inappropriate due to its lack of functionality. If only **one** witness with good repute was available, the accused's conviction required his confession even though there additional was incriminating circumstantial evidence. All the more, such incriminating circumstantial evidence on its own was not sufficient.

²² *Fried* (supra note 9), p. 232, 278; *Gmür/Roth*, Grundriss der deutschen Rechtsgeschichte, 11th edition 2006, side note 222; *v. Hippel*, p. 87, 88, 90, 154 with footnote 7, 8, p. 157 at the end, 158 with footnote 1; *Rüping/Jerouschek* (supra note 3), side note 69, 76, 78; *Eb. Schmidt* (supra note 8), p. 91; *Wesel* (supra note 3), side note 237.

²³ *Gmür/Roth*, side note 222 with references to the Bible.

²⁴ From today's point of view, that mistrust is justified; thereto *Kühne*, Strafprozessrecht. Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts, 8th edition, 2010, side note 756 (the 9th edition will be published in 2015).

– In conclusion it may be said: the confession's predominance firstly resulted from an otherwise threatening lack of evidence (in German: *Argument der Beweisnot*).²⁵ –

b) Confessions were religiously overstated because criminal offences were treated as sin against God (*Ignor*; v. *Soden*);²⁶ therefore, this proof, from a religious standpoint being the accused's confession of his sins, was necessary for the salvation of his soul.

– This religious standpoint is the second reason for the confession's predominance. –

c) The secular power in the German Empire, its territories and cities (such secular powers were also called the "secular arm") considered serious criminal offences as contempt of its authority. From this point of view, only a confession indicated the accused's acknowledgment of his disobedience.²⁷

– This view may be a third reason for overstating the confession. –

Such fatal mixture of *Beweisnot*,²⁸ religious overstating of confessions, and also the secular arm's expectation of repentance showed by the accused, inevitably resulted in an extensive use of torture.

²⁵ Thereto: *Rüping/Jerouschek*, side note 78, 84; *Eb. Schmidt*, p. 91; *Wesel*, side note 237.

²⁶ *Ignor*, Geschichte des Strafprozesses in Deutschland: 1532-1848, 2002, p. 68 et seq.; v. *Soden*, *Confessio* zwischen Beichte und Geständnis, 2011; also see *Rüping/Jerouschek*, side note 78 ("*Meta-physische Überhöhung*").

²⁷ Apparently, the authority considered the accused's **denying his guilt with obstinacy** as contempt of court.

²⁸ See supra, a) at the end.

7. Conclusion

In view of that time, the **use of interrogational torture** firstly was absolutely required for reasons of proof, secondly it should ensure the accused's salvation by means of his confession, thirdly such use in order to obtain a confession served the reconciliation with the secular arm. Accordingly, opponents of this barbaric interrogational instrument had a hard time then.

In addition, the implementation of torture was decisively supported by its ecclesiastical legalization/legitimation as well as by the reception of Roman Law including criminal law.²⁹

In the end, it should be remembered that interrogational torture typically comes along with cruel criminal law. This also held for the Late Middle Ages: In the German cities and territories, a cruel criminal law, characterized by punishment striking life and limb (in German: *peinliches Strafrecht*), developed step by step.³⁰ Thereby, it was primarily the despised lower class which was concerned by both *peinliches Strafrecht* and **torture**.³¹

²⁹ As to the influence of Roman Law see: *Gmür/Roth* (supra note 22), side note 222-224; v. *Hippel* (supra note 3), p. 89, 94; *Wesel* (supra note 3), side note 237 with 133; dissenting: *Rüping/Jerouschek* (supra note 3), side note 78, 84; *Eb. Schmidt* (supra note 8), p. 93. As to the decisive relevance of heresy trials see: *Rüping/Jerouschek*, side note 29, 30-35, 79, 82; *Wesel*, side note 236, 237; dissenting *Eb. Schmidt*, p. 93 (yet compromising p. 98).

³⁰ *Gmür/Roth*, side note 215; v. *Hippel*, p. 131-137; *Wesel*, side note 236.

³¹ See supra, VI, 1, 3, 5.

VII. Early Modern Age (circa 1500-1800)

1. Continuation of the Late Middle Ages in the 16th and 17th Century

Among historians, particularly German ones, the end of the Middle Ages and at the same time the beginning of the Early Modern Age usually is defined as about end of the 15th century/beginning of the 16th Century.³² From the author's standpoint, such definition seems to be questionable.

Indeed, there are good reasons for the respective definition, in particular the following ones:

- The so-called *Ewiger Landfrieden* (meaning Eternal Public Peace) in Germany, dated 1495, in connection with establishing as Imperial High Courts the *Reichskammergericht* (1495 as well) and shortly later the *Reichshofsrat*, the former being a court of the “Holy Roman Empire of the German Nation”, the latter being a court of its Emperor.³³
- The *Constitutio Criminalis Carolina*, also called *Peinliche Halsgerichtsordnung* of the German Emperor Karl V dated 1532.³⁴
- The discovery of America as “The New World” in 1492 by *Columbus*.
- *Martin Luther's* Reformation since 1517 and the Augsburg religious peace, also called Peace of Augsburg,

³² Thereto the description by: *Fried* (supra note 9), p. 8; *Wesel*, side note 241.

³³ Thereto *Fischer*, *Juristenzeitung* (JZ, i.e. a German law journal), p. 1077 et seq.

³⁴ See *infra*, a).

dated 1555, the latter ensuring to a large extent religious freedom in Germany.³⁵

However, there are significant reasons for the author's differing view, that by the very nature of the matter the 16th and 17th century are to be characterized as continuation of the Late Middle Ages.³⁶

Firstly, there only was little change in the different classes of society (estates of the realm, in German: *ständische Gliederung des Reiches*³⁷) between nobility, urban citizens and, mostly bonded, peasants.³⁸

Secondly, the *peinliche Strafrecht*, characterized by cruel punishment against life and limb, and the *Inquisitionsprozess*, using inhuman **torture**, both in their core remained unchanged or

– as to the witch trials during the 16th and 17th century – even got worse.

a) German Criminal Law: Completion of the Reception of Canon Law and Roman Law by the *Constitutio Criminalis Carolina* (CCC, dated 1532)

(1) The establishment of the mentioned *Reichskammergericht* and, specifically in the field of criminal law as well as criminal procedure law, the enactment of the CCC essentially completed that reception. The *Inquisitionsprozess*, characterized

³⁵ See: *Gmür/Roth* (supra note 22), side note 250, 261; *Wesel*, side note 241, 242.

³⁶ Likewise: *Fried*, p. 535, 536 et seq., **558**; *Eb. Schmidt*, p. 17, 18; similar: *Gmür/Roth*, side note 231; *Wesel*, side note 202, 241 et seq.

³⁷ Respectively of its territories (e.g. Duchy of Bavaria).

³⁸ *Wesel*, side note 202, 241, 244.

by torture and cruel punishment striking life and limb, meanwhile largely got predominance and thereby displaced the traditional private prosecution (supra VI, 5) to a large extent.

The aforesaid *Constitutio Criminalis Carolina* (CCC), enacted in 1532 by the German Imperial Diet (in German: *Reichstag*) was both, imperial **criminal procedure code** and imperial **criminal code** of the “Holy Roman Empire of the German Nation”.³⁹ This Imperial code did not take unconditional priority over laws of the German territories since at that time the principle “*Reichsrecht bricht Landesrecht*” (meaning: German Imperial law prevails over territorial laws) did not generally apply.⁴⁰ Rather, the CCC in its preamble⁴¹ laid down a certain priority of the territorial laws by using the following *salvatorische Klausel* (i.e. severability clause/salvatoric clause):

“Doch wollen wir durch diese gnedige erinnerung Churfürsten Fürsten und Stenden, an jren alten wohlherbrachten rechtmessigen vnnd billichen gebreuchen nichts benommen haben”.⁴²

Near translation: Yet, this Imperial code shall not affect Electors, Princes and Estates of the Realm (in German: *Stände*⁴³) in their old traditional just and equitable customs.

³⁹ In the following, the CCC is cited from: *Schroeder* (editor), *Die Peinliche Gerichtsordnung Kaiser Karls V. mit Erläuterungen*, published in 2000.

⁴⁰ Nevertheless, judges and jurymen were obliged to swear an oath of allegiance to the CCC pursuant to Art. 3 and 4 of this code.

⁴¹ Original version: *Vorrede* (at its end).

⁴² See supra note 39. – The original version, dated 1532, illustrates the archaic character of the German language at that time. –

⁴³ Like nobility (e.g. Imperial Counts) and Free Imperial Cities.

Nevertheless, the CCC subsequently prevailed in the territories to a large extent, and it became a basis for the starting German Penology (in German: *Strafrechtswissenschaft*).⁴⁴

(2) The main focus of the CCC was criminal procedure law, namely the *Inquisitionsprozess* and the **torture's admissibility** in the first place. Thereby, the code aimed at fighting the then incomprehensible legal uncertainty and arbitrariness of the German criminal justice (*Eb. Schmidt*) as well as the lack of legal harmonization within the German empire.⁴⁵ In particular, the CCC adopted the use of torture, but tried to restrict such use significantly, inter alia in the following ways:

- Requirement of serious incriminating circumstantial evidence (Art. 20, 22 CCC);
- Comprehensive catalogue of sufficient circumstantial evidence (Art. 18-44 CCC), but unfortunately no exhaustive one;
- Requirement of a careful balance between incriminating and exculpatory evidence (Art. 28 CCC);
- The judge's duty to carry out the in Germany so-called *Aktenversendung* (i.e. giving submission of files) in case of doubts as to the admissibility of torture (Art. 28 at the end CCC). Such *Aktenversendung* was to be addressed to Superior Courts or Law Faculties.

⁴⁴ Thereto: v. *Hippel* (supra note 3), p. 212; *Eb. Schmidt* (supra note 8), p. 147 et seq.; *Wesel* (supra note 3), side note 258, 259.

⁴⁵ *Krey*, Keine Strafe ohne Gesetz, 1983, side note 10 with further references. Here are also to be found some remarks on the CCC's precursor, namely the *constitutio criminalis Bambergensis* of 1507.

Thereto, the CCC formulated in Art. 219 first and third sentence as follows:

“Erklerung bei wem, vnd an welchen orten rath gesucht werden soll”

First sentence: “... bei jren oberhofen”

Third sentence: “... bei den nechsten hohen schulen ...”

Near translation: Determination to which authority and what place the *Aktenversendung*⁴⁶ has to be carried out.

First sentence: ... to the competent Superior Court ...

Third sentence: ... to the nearest University's Law Faculty ...

(3) However, there were some other regulations on using **torture**, being malicious respectively unsatisfactory from the outset, such as the following ones:

- In case of retraction of a confession made under torture, the use of torture was repeated (Art. 57 CCC).
- Retracting a confession at the “*entlicher rechttag*” (CCC, in today's German: *endlicher Rechtstag*; here the already taken judgement only had to be publicly pronounced⁴⁷) was irrelevant: in such cases, the confession obtained under torture was attested by two jurymen, Art. 91 CCC.
- The torture's form, severity, duration and frequency occurred pursuant to judiciary discretion.

⁴⁶ By its very nature being the request for legal advice.

⁴⁷ Thereto with further references: *Roggenfelder*, Staatsanwalt und Richter als Wächter des Gesetzes gegenüber der Polizei im strafrechtlichen Ermittlungsverfahren, 2013, p. 42 et seq., 46.

Thereto, Art. 58 CCC laid down:

“Von der maß peinlicher frage”

“... die peinlich frag soll nach gelegenheyt ..., vil, offt oder wenig, hart oder linder nach ermessung eyns guten vernünftigen Richters, fürgenommen werden ...”

Near translation: As to form, severity, duration and frequency of interrogational torture.

Using torture shall be carried out according to the circumstances ... often or less often, severely or less severe, at the discretion of a good and reasonable Judge.

Such recourse to judiciary discretion de facto opened the floodgates to judiciary arbitrariness since by its very nature, Art. 58 CCC was little more than a blank form lacking in content.

(4) An appraisal of the CCC’ regulation on interrogational torture results in a terrifying image/scene of horror:

On the one hand, only the CCC had legalized and legitimated the use of torture throughout the entire German Empire. Indeed, interrogational torture was already in use during the Late Middle Ages;⁴⁸ however, torturing the accused not yet was ubiquitous.

On the other hand, there was a serious lack of insight into the fact, that confessions under torture could be wrong, and therefore the dogma, “*the confession was the Queen of evidence*”, could not be convincing; by all means, this hold in case of severe torture. On the contrary, already the Roman Empire’s law of evidence at least had recognized, that confessions of

⁴⁸ See supra, VI.

slaves and freemen under torture could not have absolute probative value.⁴⁹

Thus, the mentioned attempts to restrict the use of torture (see supra, [2]) were ultimately ineffectual, additionally those efforts were devaluated by the aforesaid malicious regulations how to treat cases of retracting confessions (see supra, [3]).

(5) In the end, such attempts were unable to achieve their ambitions if only because of the annoying fact that they were not respected enough in numerous German territories. Above all, the *per se* well-intended legal institution of *Aktenversendung* (see supra [2]) firstly too seldom was carried out and secondly shockingly often did not result in protecting the accused against **torture** since the seized Superior Court respectively Law Faculty *in casu* declared admissible the threatening torture.

b) The Witch Trials during the 16th and 17th Century: Decline of Criminal Law and Criminal Proceedings

In the field of criminal law and criminal procedure law, the **Early Modern Age in its first two centuries**, the 16th and the 17th one, not only has continued the dark Late Middle Ages but has made the undesirable development in such fields even worse, namely by final adoption of the *Inquisitionsprozess* with cruel punishment striking life and limb as well as inhuman torture.

Thereby, the witch trials during the mentioned centuries represented the absolute low-point of that development. This is

⁴⁹ *Der Kleine Pauly*, Lexikon der Antike, 1979, Volume 4, keyword *Quaestio per tormentum* at the end; Volume 5, keyword *Tormenta* at the end.

because they resulted in a permanent breach of the legal limits

– being per se already more or less insufficient⁵⁰ –

enacted by the CCC for criminal law and criminal proceedings and at least originally intended to be applicable also to witch hunts.

Such witch trials that caused all in all about one hundred thousand deaths⁵¹ shall be no subject to an in-depth analysis at this place. Insofar, referring to the author's publication "*Von Zauberern und Hexen, Rechtshistorische Betrachtungen*" (i.e.: About Magicians and Witches, Reflections on Legal History), dated 2014,⁵² shall be sufficient. Hence, regarding witch trials, only the following statements ought to be made here⁵³:

(1) Indeed, there were witch trials already in the 15th century, but the 16th and 17th century formed the key area of persecuting witches. Here, horrifying waves of persecution occurred.⁵⁴

The decisive bursting of the dam, enabling this bad development, took place at the end of the 15th century by reason of

⁵⁰ See supra, a).

⁵¹ Thereto: *Rüping/Jerouschek* (supra note 3), side note 147; *Wesel* (supra note 3), side note 261; dissenting *inter alia* v. *Hippel* (supra note 3), p. 231: several hundred thousands of deaths.

⁵² See *Krey* (supra note 20), p. 19-46 with numerous references.

⁵³ As to the following statements see e.g.: *Fried* (supra note 9), p. 278, 482, 483; *Gmür/Roth* (supra note 22), side note 333; v. *Hippel*, p. 230 et seq.; *Jerouschek*, Die Hexen und ihr Prozess, 1992; *Rüping/Jerouschek*, side note 133, 141-149; *Eb. Schmidt* (supra note 8), p. 209 et seq.; *Wesel* (supra note 3), side note 261-264.

⁵⁴ Insofar, primarily, are to be mentioned the second half of the 16th century, more precisely the sixties, at the second place, in the 17th century, the thirties and sixties. Thereto *Krey* (supra note 52), p. 40 with further references.

Pope *Innocent VIII's* infamous **papal bull** of 1484 on witch hunts called "*Summis desiderantes affectibus*" (abbreviated name in German: *Hexenbulle*, meaning bull on witches).⁵⁵ It was subsequently followed by the even more fateful combat writing/pamphlet against witches of 1487 under the title *Mal-leus Maleficarum* (in German: *Hexenhammer*, meaning hammer against witches, or briefly said: witch hammer) by the Dominican *Heinrich Kramer*, being active as an inquisitor.⁵⁶ The *Hexenhammer*, to be characterized as a sanguinary, highly neurotic, and extremely anti-woman botch, in detail described the *Inquisitionsprozess* in witch trials, being combined with torture and capital punishment.⁵⁷ Such form of trial was strongly demanded by *Kramer* and in its core approved by the church.

(2) The legal limits enacted by the *CCC* with respect to the **criminal liability for witchcraft** as well as to the **admissibility of interrogational torture** were brutally disregarded:

(a) The former (concerning the question of criminal liability) only classed as a criminal offence the so-called *Schadenszauber* (in Latin *maleficium*, meaning black magic/harmful magic) pursuant to Art. 109 *CCC* which laid down:

"Item so jemandt den leuten durch zauberey schaden oder nachtheyl zufügt, soll man straffen vom leben zum todt, vnnd man soll solche straff mit dem ffeuer thun ..."

Near translation: He who (whoever) causes damage or disadvantage to third parties by using black magic shall be punished with death to be executed by burning.

⁵⁵ See *Krey*, p. 31, 32, 38 with further references.

⁵⁶ Thereto in detail and with further references *Krey*, p. 32-36, 38.

⁵⁷ *Fried*, p. 278, 483.

Unfortunately, there was in addition a statutory regulation on the criminal liability for **attempted** black magic (Art. 109 second sentence CCC), being extremely vague:

“Wo aber jemandt zauberey gebraucht, vnnd damit niemant schaden gethan hett, soll sunst gestrafft werden, nach gelegenheit der sach, darinnen die vrtheyler radts gebrauchen sollen, wie vom radt suchen hernach geschriben steht.”⁵⁸

Near translation: In case of using black magic without causing damage to third parties, the offender shall be punished otherwise according to the circumstances of the case at hand, and here the judges shall carry out the *Aktenversendung* (Art. 219 CCC).⁵⁹

In contrast, the main focus of convictions in witch trials during the 16th and 17th century laid in *pactum cum diabolo* (i.e. pacts with the devil), *coitus cum diabolo* (sexual intercourse with the devil), and/or Witches’ Sabbath (meaning a secret nocturnal meeting of witches with the devil).⁶⁰ However, such forms of witch-offences were not criminalized by the CCC.

(b) Moreover, the mentioned limits of using **torture**⁶¹ essentially were abandoned in witch trials; this holds particularly for the requirement of serious incriminating circumstantial evidence.⁶²

⁵⁸ Here, the CCC refers to its Art. 219 (see *infra* note 59).

⁵⁹ As to such *Aktenversendung* to be addressed to Superior Courts or Law Faculties, see *supra* VII, 1 a (2) at the end with footnote 46.

⁶⁰ Thereto: Krey, *Von Zauberern und Hexen* (*supra* note 20), p. 39, 40; Wesel, side note 261; similar Rüping/Jerouschek, side note 141, 144, 146.

⁶¹ See *supra*, VII, 1, a, (2) with (4), (5).

⁶² See: v. Hippel, p. 230; Krey, *supra* note 60; Rüping/Jerouschek, side note 133, 148; Eb. Schmidt, p. 210; Wesel, side note 258, 261.

In the end, even in case of confession under torture, being the rule in witch trials, typically the use of torture was continued, namely in order to force the accused to denounce other supposed witches and/or magicians. Insofar, here torture occurred in its appearance as the above-mentioned *Zeugenfolter*⁶³: The **accused** was forced under torture to act as a **witness for the prosecution** against third parties.

– By the way, the malpractice of torture against witnesses was already used during the epoch of the Roman Empire.⁶⁴ –

Subsequently, the instrument of torturing accused witches intending to obtain incriminating evidence against other supposed witches became one of the reasons for the aforesaid terrible waves of persecution.⁶⁵

(3) Due to the very nature of the matter, the mentioned trials against heretics⁶⁶ to a certain extent were being continued by the witch trials.⁶⁷ The latter also had further shameful precursors, namely the pogroms against the Jews during the 14th century in which **torture** and killing by burning already were widespread.

(4) Witch-hunting in its core was class justice; the victims mostly were women, predominantly old ones.⁶⁸ However, exceptionally even members of the clergy or upper class could

⁶³ Supra, Volume I, Introduction (with footnote 5).

⁶⁴ *Mommson*, Römische Strafrecht, 1899 (reprint 1961), p. 407, 408.

⁶⁵ Thereto: *Rüping/Jerouschek* (supra note 3), side note 146-148; *Eb. Schmidt* (supra note 8), p. 210; *Wesel* (supra note 3), side note 261. Regarding those waves of persecution of witches, see supra, VII, 1 b (1) with footnote 54.

⁶⁶ See supra, VI, 2 (with footnotes 9-13).

⁶⁷ *Fried* (supra note 9), p. 278, 483; *Eb. Schmidt*, p. 209.

⁶⁸ *Krey* (supra note 20), p. 41 with further references; *Rüping/Jerouschek*, side note 144, 147; *Wesel*, side note 261.

become a victim of witch-hunting.⁶⁹ The already mentioned privilege of the nobility, clergy, and doctores of law not to be subjected to torture⁷⁰ in such cases was disregarded; yet, those exceptions *de facto* only concerned the latter two privileged categories of persons but not the nobility.

(5) Summing up, the following should be noted:

The horror of witch trials is a serious blemish on the Roman Catholic Church but also, even though significantly less severe, of the Protestant churches.⁷¹

At the same time, the territorial rulers/German princes and city authorities, who tolerated or even more conducted or supported such horror in spite of its cruelty and irrationality, also were seriously to blame for witch-hunting. The same is true for all members of the legal profession who were involved as trial judges in torturing and punishing or have tolerated as Su-

⁶⁹ So e.g. the following victims of witch trials with torturing, punishing with death and burning: **Firstly** *Dietrich Flade*, doctor of law, professor of law at Trier University and its Rector, also judge, in 1589. **Secondly** *Georg Haan*, doctor of law, Chancellor of the *Fürstbistum* (i.e. prince-bishopric/principality) of Bamberg in the twenties of the 17th century. **Thirdly** *Johann Junius*, Mayor and Councillor of the City of Bamberg, in 1628. Thereto with further references *Krey*, p 41, 42.

⁷⁰ See *supra*, VI, 5 at the end with footnote 19.

⁷¹ Primarily the Roman Church is to blame for the witch hunting during the Early Modern Age (*supra*, VII, 1 b); here, burning of witches predominantly occurred in the catholic bishoprics respectively arch-bishoprics Trier, Mainz, Würzburg, Bamberg, Fulda. However, also in protestant German territories thousands of witches were punished with death by burning. Moreover, *Martin Luther* as well was possessed by the obsessive believe in witches. As to the aforesaid see: *Hammes*, *Hexenwahn und Hexenprozess*, 1977 (Sonderausgabe, i.e. special edition, 1995, p. 154 et seq.; *Krey*, p. 39, 40; *Rüping/Jerouschek* (*supra* note 3), side note 147; *Wesel* (*supra* note 3), side note 261.

perior Court judge respectively Professor of Law that madness in cases of the mentioned *Aktenversendung* addressed to Superior Courts or Law Faculties.⁷²

The excessive use of torture contrary to the limits enacted by the *Constitutio Criminalis Carolina*⁷³ at that time was justified by the following statement: In case of ***crimina excepta*** (extremely serious crimes), such as witchcraft,

– in addition, also the *crimen laesae maiestatis* (i.e. crime against the king respectively the territorial prince) was named in this context –

*brief and dashing criminal trials without further ado were imperative.*⁷⁴

2. The 18th Century as the Actual Beginning of the Modern Age in Criminal Law and Criminal Procedure Law

– Abolition of Witch Trials and Torture Caused by the Enlightenment –

A fundamental progress towards a human, rational and reasonable criminal law and criminal procedure law took place not until the **18th century**, being the so-called century of Enlightenment. Only now, one correctly can speak of Modern Age:

a) Precursors of this development, especially for the Enlightenment, are the so-called natural law theorists from the 17th century, notably *Grotius* (1583-1645) and *Pufendorf*

⁷² Regarding the *Aktenversendung* see supra VII, 1 a (2), (5).

⁷³ See supra, VII, 1 a (2), b (2).

⁷⁴ *Rüping/Jerouschek*, side note 132,133; *Wesel*, side note 261.

(1632-1694). However, regardless of their lasting merits for a rational, secular and reasonable law, there is a significant deficit in their work: a lack of clear and unconditional rejection of **torture** as well as of witch trials due to their character as cruel and inhuman (torture) respectively irrational, if not even delusional (witch trials). This deficit is one of the reasons why the early criticism towards witch trials and using torture against accused, primarily by *Johann Weyer* (middle of the 16th century) and *Friedrich Spee* (first half of the 17th century),⁷⁵ was widely unsuccessful during the 16th and 17th century.⁷⁶

b) Precondition for the persecution of witches, charged with *pacts with the devil*, *sexual intercourse with the devil*, and/or *Witches' Sabbath*,⁷⁷ was the excessive use of interrogational torture. Otherwise, there would have been no chance to prove such absurdity. Thus, the fight against torture as well as fighting witch-hunting were inseparably linked:

Whoever postulated the abolition of **torture** at the same time challenged the witch-hunting's legality and legitimacy; whoever proved witchcraft as irrational illusion at the same time unmasked interrogational torture as a highly dangerous instrument to falsify the truth.

⁷⁵ *Weyer* (ca. 1515-1588), personal physician to the Duke of Jülich-Kleve-Berg, published in 1563 a combat writing against witchcraft; thereto e.g. *Hammes* (supra note 71), p. 193 et seq. *Spee* (1591-1635), Jesuit, in 1631 published under a pseudonym the famous combat writing *Cautio Criminalis* against torturing in witch trials (German version, second edition 1983).

⁷⁶ Thereto with further references *Krey* (supra note 20), p. 44, 45.

⁷⁷ See supra, VII, 1 b [2] [a] at the end with footnote 60.

Both statements until the 18th century were potentially life-threatening and unacceptable for the church and widely also for the authority.⁷⁸

That interdependence in the long term destroyed both, the acceptance of witch trials as well as of torture. Due to the absurd confessions of *coitus cum diabolo etc.* under **torture**, the latter less and less was considered as, even though being inhuman, proof of ascertaining the truth. Rather, interrogational torture more and more was identified as a means **to falsify the truth**.⁷⁹

c) As already mentioned, the author has presented a more in-depth analysis on the abolition of witch trials and torture in another paper.⁸⁰ Therefore, the following overview may be sufficient here:

(1) The principal merit in fighting witch trials goes to *Christian Thomasius* (1655-1728). In a courageous publication dated 1701 he has attacked the belief in witchcraft as being absolutely irrational: *Coitus cum diabolo was an unreal delusion*.⁸¹ This insight was gaining a widespread acceptance during the 18th century. Here, amongst the German territories, Prussia

⁷⁸ Thereto: Hammes; Krey, p. 45; Wesel.

⁷⁹ Also today, the fact is to be emphasized *that the prohibition of interrogational torture not only aimed at the protection of human dignity and human rights of the victim concerned, but also served the guarantee of ascertaining the truth*. Convincingly Kühne: *At the latest since the witch trials, we knew that under torture you could force every wanted confession, be it a true or a false one*; in: *Alternativkommentar-StPO (AK-StPO, i.e. a commentary on the German Criminal Procedure Code)*, § 136 a side note 2, 3.

⁸⁰ Krey (supra note 20) p. 44-46.

⁸¹ *Thomasius, De Crimine Magiae: Coitus cum diabolo* was physically impossible. Regarding *Thomasius* see inter alia: *Eb. Schmidt* (supra note 8), p. 210, 211; *Wesel* (supra note 3), side note 261.

under King *Friedrich Wilhelm I* was exemplary because already in 1714 and thereafter 1721 he started actions against witch trials aiming at terminating such madness.⁸² Regardless of a continued opposition e.g. in Bavaria and Austria, the witch trials ended in the second half of the 18th century.⁸³

(2) Due to the insight that believing in witchcraft was irrational if not even psychopathological, interrogational **torture** at the latest from then ought to have been unmasked as an improper instrument for ascertaining the truth since confessions under torture may lead to a true declaration but also to a false or even an absurd self-incrimination like *coitus cum diabolo*.⁸⁴ However, concerning the fight against torture, *Thomasius* was less committed: He left the fight against torture up to one of his doctoral students.⁸⁵

In contrast, Prussia was exemplary also in this context: in 1740, King *Friedrich the Great* abolished torture with only a few exceptions for certain serious offences; in 1754 also such exceptions were removed.⁸⁶ Following this model and due to the criticism of interrogational torture by *Voltaire* (1694-1778)

⁸² Thereto: *Hammes* (supra note 71), Sonderausgabe p. 242; *Eb. Schmidt*, p. 211.

⁸³ The *Codex juris criminalis Bavarici* (i.e. Bavarian criminal code), dated 1751, still contained the *Crimen Magiae* (witchcraft as criminal offence) and permitted interrogational torture. See: *Rüping/Jerouschek* (supra note 3) side note 203. Austria's *Constitutio Criminalis*, 1768, as well contained the *Crimen Magiae*; see *Rüping/Jerouschek* (supra), side note 200, and *Eb. Schmidt*, p. 211.

⁸⁴ See supra, VII, 2 b with footnote 79.

⁸⁵ Thereto: *Rüping/Jerouschek*, side note 175; *Wesel*, side note 262.

⁸⁶ *Wesel*, side note 262.

and especially *Beccaria* (1738-1794) in his pioneering publication *Dei delitti e delle pene*, 1764, interrogational torture until beginning of the 19th century was abolished almost everywhere in Central Europe.⁸⁷

⁸⁷ See inter alia: *Gmür/Roth* (supra note 22), side note 337 et seq.; *Lesch/Schmitz*, *Juristenzeitung* (JZ, i.e. a German law journal), 2011, p. 33, 34; *Rüping/Jerouschek*, side note 193; *Eb. Schmidt*, p. 210 et seq.; *Schmöckel*, *Humanität und Staatsräson. Die Abschaffung der Folter*, 2000, p. 147 et seq., 172, 183 et seq.; *Vormbaum*, *Einführung in die moderne Strafrechtsgeschichte*, 2009, p. 27 et seq., 35 et seq.; *Wesel*, side note 262.

PART TWO: Refusal of the Predominant View that the Torture's Reign of Terror in the Former Inquisitionsprozess merely was the Inevitable Consequence of the Unreasonable Law on Evidence Applicable at that Time

As already mentioned, two witnesses with good reputation or the accused's confession were the only evidence admissible in the *Inquisitionsprozess* of the Late Middle Ages and the Early Modern Age; thereby, the confession was correctly characterized as *regina probationum* (Latin, i.e. royal proof).⁸⁸ Thus, it is commonly said that this law on evidence inevitably led to the use of interrogational **torture**.⁸⁹ However, that view does not sufficiently live up to the legal reality of torturing at that time:

⁸⁸ See *supra*, VI, 6 footnote 22-28.

⁸⁹ As to references, see *supra*, VI, 6 a, footnote 25. Regarding the one-sidedness of this common view see already *supra*, VI, 6, b, c, 7.

I. The Victims of Interrogational Torture: Victims of Class Justice?

The publication at hand has illustrated that interrogational torture primarily applied to members of the lower class.⁹⁰ This fact alone should be sufficient to indicate that the use of torture not only occurred in case of lacking evidence. Rather, such brutal treatment of the lower classes illustrates the contempt towards their members to whom too often “short shrift” was given.⁹¹ By contrast, where lack of evidence in trials against members of the upper classes was given, such problem only rarely led to the use of interrogational torture: insofar, referring to the already mentioned **privilege not to be subjected to torture**⁹² may be sufficient.

II. Parallelism between the Development of Torture and the Evolution of Punishment Striking Life and Limb

The brutalization of criminal proceedings by the use of interrogational torture largely coincided with the criminal law's brutalization caused by punishment striking life and limb.⁹³ This

⁹⁰ Thereto supra: Vol. I, Part One, First Chapter, III, 1 at the end, 2 a, 3, IV, 3; Vol. II, Second Chapter, VI, 1, 3, 5, 7 at the end; VII, 1 b (4).

⁹¹ In German: “*kurzen Prozess machen*”, meaning – in a critical sense – to make short trial without further ado. As to such class justice to the detriment of the lower class see supra note 90.

⁹² See supra, VI, 5 at the end with footnote 19, 20 and VII, 1, b (4) with footnote 70.

⁹³ Thereto supra, Vol. I, Part One, III 1 a, **b**, IV, 3; Vol. II, Second Chapter, VI, 7 at the end.

also shows that using torture not only resulted from lack of evidence. Rather, the brutalization of criminal law typically went hand in hand with the excessive use of torture; at the same time, primarily the lower class suffered from both undesirable developments.

III. Torturing the Accused despite the Testimony of two Witnesses with Good Repute; Interrogational Torture of Witnesses (*Zeugenfolter*); Torture as an Additional Cruelty to the Accused's Punishment (*Straffolter*); Torturing for Contempt of Court

There are further arguments refuting the one-sided view that torture merely was the inevitable consequence of lacking evidence:

1. Despite of the incriminating testimony of two witnesses with good repute, often, interrogational torture against the accused occurred in order to additionally obtain his confession.⁹⁴

This fact also illustrates the already mentioned overstating of confessions.⁹⁵ However, in this context shall be conceded that even in modern criminal proceedings *de facto* the attempt to obtain a confession typically plays an important role even though sufficient other evidence is given in the case at hand: apparently, in the case of a confession, criminal investigators feel confirmed.

⁹⁴ As to such cases of torturing **without** lack of evidence see inter alia *Rüping/Jerouschek*, side note 106.

⁹⁵ See *supra*, VI, 6, in particular b, c.

2. Furthermore, the mentioned *Zeugenfolter* (i.e. using torture in order to force an incriminating testimony of a witness against third parties)⁹⁶ shows that torturing the accused in criminal proceedings cannot be restricted to its nature as a mere instrument to obtain his conviction in case of lacking evidence.

3. The delimitation between interrogational **torture** in criminal proceedings due to lack of evidence on the one hand and *Straffolter* (i.e. torture as an additional cruelty to the accused's punishment) on the other hand in the Late Middle Ages and the Early Modern Age de facto is blurred: torturing the convicted with red-hot iron on his way to the place of execution typically was used as a worsening of the punishment for his offence (*Straffolter*).

4. Also ill-treatment against the accused during his interrogation by its very nature often might have been an (additional) sanction for "contempt of court": at that time, he who denied in a persistent manner instead of making an **early** confession showed neither remorse, being an insult to god, nor respect for the authority, which back then should be punished immediately.

⁹⁶ Thereto supra, Vol. I, Introduction with footnote 5; Vol. II, Second Chapter, VII, 1 b (2), (b).

IV. Regardless of the Abolition of Torture since the Middle of the 18th Century: Continuance of Criminal Justice in its Manifestation as *Inquisitionsprozess* (Inquisitorial Trial) until its Replacement by the Modern Criminal Proceedings in the 19th Century

– No Collapse of Criminal Proceedings Despite of the Torture's Abolition –

It goes without saying that the **abolition of torture** could have caused considerable evidentiary problems for the criminal justice as long as the *Inquisitionsprozess*, requiring as proof two witnesses with good repute or the accused's confession, still was in force. It is no coincidence that the abolition of such unreasonable manifestation of trial, characterised by its disastrous law on evidence,⁹⁷ belonged to the demands for reform of Enlighteners such as *Voltaire*. However, there was no collapse of criminal proceedings during the long period between the torture's abolition on the one hand and the replacement of the former *Inquisitionsprozess* by the modern criminal proceedings⁹⁸ (in German: *reformierter Strafprozess*) on the other hand. Rather, the criminal courts inter alia managed with the following stopgaps:

⁹⁷ See supra, VI, 2, 5, 6.

⁹⁸ In Germany, following the French model, since the middle of the 19th century. Such modern criminal proceedings abolished the mentioned too rigid law on evidence and replaced it by the principle of free judicial evaluation of evidence. See: *Rüping/Jerouschek* (supra note 3), side note 243 et seq.; *Vormbaum* (supra note 87), p. 105.

- *Verdachtsstrafen* (i.e. punishment merely based on a sufficient suspicion; yet, it had to be more lenient than the statutory punishment).⁹⁹
- *Instanzenbindung* (meaning a mere temporary dismissal of proceedings without legal force instead of an acquittal).¹⁰⁰
- Sanctions with repressive nature, in particular **thrashing**, against a suspect being accused who is denying the basis of the accusation.¹⁰¹ Back then, such sanction was not regarded as **torture**;¹⁰² in view of the torture's unimaginable cruelty¹⁰³ this playing down appears to be understandable, at least from the perspective at that time.

According to the principle of the rule of law, “stopgaps” like the mentioned ones on their part were not tolerable; however, they were by no means similar to the horror of torture. As a consequence of the abolition of the former *Inquisitionsprozess*, also those stopgaps became obsolete.

⁹⁹ *v. Hippel* (supra note 3), p. 230; *Rüping/Jerouschek*, side note 177, 193, 196; *Vormbaum*, p. 37.

¹⁰⁰ Thereto: *v. Hippel*, p. 230; *Vormbaum*, p. 37.

¹⁰¹ *Rüping/Jerouschek*, side note 178; *Vormbaum* (supra note 87), p. 37.

¹⁰² See supra note 101. In detail now *Knapp*, Die Ungehorsamsstrafe in der Strafprozesspraxis des frühen 19. Jahrhunderts, 2011.

¹⁰³ Thereto with many illustrations *Schild*, Alte Gerichtsbarkeit, 1980, in particular p. 158-166.

Closing Words

The history of interrogational **torture** in criminal proceedings illustrates to what inhuman horror an inappropriate and unreasonable law on evidence can lead. In addition, the paper at hand shows which cruelties may result out of shameful class justice to the detriment of the despised lower class. Furthermore, this paper points out what disastrous consequences for criminal proceedings may be caused by such cruel criminal law as the mentioned *“Peinliches Strafrecht”*. In the end, the history of interrogational torture in criminal proceedings illustrates what dangers may arise out of the above-mentioned overstating of confessions.

Interrogational Torture in Criminal Proceedings

– Reflections on Legal History –

Volume II

Subject of this publication is torture as an interrogational instrument in criminal proceedings from a legal history point of view. Thereby, the paper at hand is the continuation of Volume I (published in 2014, number 68 of the Legal Policy Forum).

Volume II covers the following historical periods: Late Middle Ages and Early Modern Age; the latter ending with the 18th century as the so called Century of Enlightenment, being the actual beginning of the Modern Age in criminal law and criminal procedure law.

The paper ends with critical remarks against the predominant view that the torture's reign of terror in the former Inquisitionsprozess merely was the inevitable consequence of the unreasonable law on evidence applicable at that time.